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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS COLON, Defendant and Appellant.	B233702 (Los Angeles County Super. Ct. No. BA362844)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Luis Colon appeals from the judgment entered following his convictions by jury on two counts of forcible rape (Pen. Code, § 261, subd. (a)(2);[1] counts 1 & 2), two counts of forcible anal and genital penetration by a foreign object (§ 289, subd. (a); counts 3 & 4), count 7 – forcible oral copulation (§ 288a, subd. (c)(2)), and two counts of forcible sodomy (§ 286, subd. (c)(2); counts 8 & 9) with, as to each of the above counts, a multiple victim finding (§ 667.61, subds. (b) & (e)(5)).[2] The court sentenced appellant to prison for 105 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established as follows. S.R. was born on February 28, 1982. Between about February 28, 1997, and July 1998, appellant forcibly raped S.R. more than five times and, using duress, digitally penetrated her vagina more than 10 times when she was in bed.

During the first forcible rape, which occurred when S.R. was 15 years old, appellant told S.R. to shut up and not tell her mother because her mother would not believe S.R. Appellant also told S.R. that if her mother called the police, the police would not believe S.R. or her mother because both were in the United States illegally, and both would be deported to Guatemala. During the digital penetrations, appellant similarly threatened S.R. and told her to be quiet because her sister was sleeping next to S.R.

In about 2000, appellant forcibly orally copulated L.P., his wife. L.P. asked appellant why he did it and he said it did not matter. In about 2000, he also forcibly sodomized her. She was bleeding and told him to look at what he had done. He said it did not matter and it was normal. In about 2001, he again forcibly sodomized her. L.P. did not go to the police

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[1] Unless otherwise indicated, subsequent statutory references are to the Penal Code.

[2] The jury also found as to each of counts 1 through 4 appellant committed the offense when the victim was under the age of 18 years and the prosecution of said offense commenced before the victim's 28th birthday (§ 801.1, subd. (a)).

because appellant told her, inter alia, police would not believe her and he had been a gang member.

Appellant told Los Angeles Police Detective Cherie Stelter that appellant had engaged in consensual sexual intercourse with S.R. twice a week for about six months. He also told Stelter that he had engaged in oral and anal sex with L.P. but he had not wanted to do so.

In defense, appellant presented evidence of his good character and behavior. He also presented evidence S.R. attended his 2006 wedding to his second wife, S.R. congratulated him, and she appeared to be normal.

ISSUES

Appellant claims (1) the trial court erroneously refused to instruct on unlawful sexual intercourse as a lesser included offense of forcible rape, (2) the prosecutor committed misconduct by intentionally eliciting from a detective inadmissible lay opinion that child abuse suspects minimized what had occurred, and (3) the trial court erred by giving CALCRIM No. 358, because it failed to state that its admonition to the jury to view oral statements of appellant with caution applied only to his inculpatory statements.

DISCUSSION

1. *The Trial Court Properly Refused to Instruct on Unlawful Sexual Intercourse as a Lesser Included Offense of Forcible Rape.*

Counts 1 and 2 alleged in statutory language appellant raped S.R. in violation of section 261, subdivision (a)(2). That subdivision provides, in relevant part, "(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." For sake of brevity, we will refer to this as forcible rape.

The information also alleged, in relevant part, "It is further alleged within the meaning of Penal Code section 801.1(a), . . . as to count(s) 1, 2, 3 and 4 that the following circumstances apply: [S.R.], was *under the age of 18 years at the time of the commission of the offense* and this prosecution was commenced prior to [S.R.]'s 28th birthday."[3] (Italics added; some capitalization omitted.)

During discussions regarding jury instructions, appellant asked the court to instruct the jury on unlawful sexual intercourse as proscribed by former section 261.5, as a lesser included offense of forcible rape as alleged in each of counts 1 and 2. Former section 261.5, subdivision (a), provides, in relevant part, "(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, *if the person is a minor*."[4] (Italics added.) In essence, appellant argued there was no dispute he had sexual intercourse with S.R., the issue was whether she consented, and consent would negate a showing the rape was forcible. The court refused appellant's request.

Appellant claims the trial court's refusal was error. He argues that under the accusatory pleading test for determining whether an offense is a lesser included offense, the language of the violation of section 261, subdivision (a)(2), alleged as to each of counts 1 and 2 must be read together with the language pertaining to section 801.1, subdivision (a), alleged as to each of those counts. He maintains the result is each of counts 1 and 2 effectively alleged forcible rape accomplished with a person "under the age of 18 years at the time of the commission of the offense"; therefore, a violation of former section 261.5, which requires sexual intercourse accomplished with a person who "is a minor," is a lesser

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[3] Section 801.1, subdivision (a), states, in relevant part, "(a) Notwithstanding any other limitation of time described in this chapter, prosecution for a felony offense described in Section 261, . . . or 289, ... that is alleged to have been committed when the victim was under the age of 18 years, may be commenced any time prior to the victim's 28th birthday."

[4] Subdivision (a), also provides a minor is a person under the age of 18 years. Subdivisions (b) through (d), set forth separate punishments depending on the age difference between the defendant and victim.

included offense of each of counts 1 and 2 as effectively alleged in the accusatory pleading. We reject the claim.

A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. The reason is constitutionally based. Due process requires that an accused be advised of the charges against the accused in order that the accused may have a reasonable opportunity to prepare and present a defense and not be taken by surprise by evidence offered at trial. The required notice is provided as to any lesser offense that is necessarily committed when the charged offense is committed. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*).)

In *People v. Lopez* (1998) 19 Cal.4th 282 (*Lopez*), our Supreme Court stated, "A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.] This sua sponte obligation extends to lesser included offenses if the evidence '*raises a question as to whether all of the elements* of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]' [Citations.] As we stated recently, 'A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] "there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from *guilt* of the greater offense" [citation] *but not the lesser*. [Citations].' [Citations.]" (*Id.* at pp. 287-288; first and second italics added.)

Two tests are used to determine whether a lesser offense is necessarily included in the charged offense: the elements test and the accusatory pleading test. "The elements test is satisfied when ' "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*Lopez*, *supra*, 19 Cal.4th at pp. 288-289.)

There is no dispute unlawful sexual intercourse as proscribed by former section 261.5, is not a lesser included offense of forcible rape under the elements test. The issue is what result obtains under the accusatory pleading test.

Section 801.1, subdivision (a), is a statute of limitations. " 'The purpose of a statute of limitations is to limit exposure to criminal *prosecution* to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.' " (*People v. Riskin* (2006) 143 Cal.App.4th 234, 241 (*Riskin*), italics added.) In *People v. Meza* (2011) 198 Cal.App.4th 468 (*Meza*), the court stated, ". . . the statute of limitations is not an *element* of the offense . . . . [Citation.] 'Whether an action is time-barred under the applicable statute of limitations does not involve a "substantive issue of *guilt* or innocence." ' [Citation; fn. omitted.]" (*Id.* at p. 476, italics added.)

Riskin was a case involving another provision (former section 803, subdivision (g)) that, like section 801.1, subdivision (a), extended the statute of limitations. *Riskin* observed, ". . . none of the facts relevant to extension of the statute of limitations . . . is a 'fact necessary to constitute the crime with which [Riskin was] charged.' [Citations.]" (*Id.* at p. 240; *Meza, supra*, 198 Cal.App.4th at p. 476 [accord].) " 'Although the right to maintain the action is an essential part of the final power to pronounce judgment, that right "constitutes no part of the crime itself." [Citation.] [¶] . . . [T]he statute of limitations is not "an 'element of the offense' in the sense that it defines the actus reus or the mens rea which characterizes the crime." [Citation.]' [Citation.]" (*Meza*, *supra*, 198 Cal.App.4th at p. 476.)

In the present case, the information alleged as to each of counts 1 and 2 that appellant forcibly raped S.R. The information also alleged as to each of those counts that S.R. was "under the age of 18 years at the time of the commission of the offense" within the meaning of the statute of limitations provision of section 801.1, subdivision (a). However, as appellant concedes, the statute of limitations is not an element of the offense of forcible rape. Whether an action is time-barred under that statute of limitations is not an issue involving appellant's substantive guilt or innocence of the offenses.

As applicable here, due process notice principles seek to provide a defendant a reasonable opportunity to prepare and present a defense, and seek to prevent surprise. It is simply unfair to require a defendant to read allegations the sole function of which has been to raise an issue of whether a prosecution is timely, with allegations the function of which has been to raise an issue of whether the defendant committed a charged offense, in order to determine whether the defendant may be convicted of a lesser included offense.

The allegation as to each of counts 1 and 2 that, "within the meaning of Penal Code section 801.1(a)," S.R. was "under the age of 18 years at the time of the commission of the offense" *expressly* related the allegation of S.R.'s minority to only one issue: the statute of limitations. This language put appellant on notice S.R.'s minority impacted the statute of limitations issue, and thus gave appellant a " ' " 'reasonable opportunity to prepare and present [a] defense' " ' " (*Reed, supra*, 38 Cal.4th at p. 1227) against a *statute of limitations* allegation pertaining to the offense of forcible rape. However, neither this language nor any other language in the information put appellant on notice S.R.'s minority impacted any other issue or, in particular, the issue of whether appellant committed the *offense* of forcible rape of *a minor*. That is, neither the above quoted language nor any other language in the information gave appellant a reasonable opportunity to defend against that charge, much less an uncharged offense that appellant committed the *lesser included* offense of unlawful sexual intercourse with a minor.

Were we to conclude otherwise, the language that, "within the meaning of Penal Code section 801.1(a)," S.R. was a minor at the time of the offense, i.e., language which directs defendants' attention to a statute of limitations provision, would be a trap for the unwary and lull defendants into a false sense of security that they need only defend themselves against a statute of limitations allegation when in fact, to defendants' surprise, the allegation would be considered as part of a greater offense for purposes of determining whether another offense was lesser included.

In sum, the statute of limitations allegations pursuant to section 801.1, subdivision (a), cannot be read together with the allegations in counts 1 and 2 that appellant committed forcible rape for purposes of determining whether unlawful sexual intercourse is a lesser included offense of the offenses alleged in those counts.[5] The language the victim was "under the age of 18 years at the time of the commission of the offense" served only one function: to put appellant on notice of the statute of limitations issue of whether the prosecution was timely. Appellant cites no authority holding the contrary. The trial court did not err by refusing to instruct on unlawful sexual intercourse under former section 261.5, as a lesser included offense of forcible rape as alleged in each of counts 1 and 2.

2. *No Prosecutorial Misconduct, and No Ineffective Assistance of Counsel, Occurred*.

Detective Stelter testified during direct examination by the People that she was assigned to the police department's section pertaining to child abuse, including child sexual abuse. When she was so assigned, she received specialized training. The prosecutor asked Stelter what that training was, and Stelter replied without objection, "We have specialized training in interrogating or interviewing possible suspects of child abuse; different ways to go about interrogating or bringing up . . . the matters of sexually related matters on how children, a lot of times the suspects, will minimize what happened. You know, instead of

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[5] Neither *People v. Marshall* (1957) 48 Cal.2d 394 (*Marshall*) nor *People v. Cook* (2001) 91 Cal.App.4th 910 (*Cook*), cases cited by appellant, compels a contrary conclusion. In *Marshall*, the defendant was charged with robbery and the information alleged the personal property taken was an automobile. (*Marshall*, at p. 399.) An element of robbery is the taking of personal property (§ 211), and *Marshall* relied on the accusatory pleading test to conclude the information alleged robbery of an automobile, permitting the further conclusion theft of a vehicle in violation of former Vehicle Code section 503, was a lesser included offense. In sum, *Marshall* relied on the accusatory pleading test merely to identify the nature of the personal property the taking of which was an element of robbery. The allegation the property was an automobile served no function other than to amplify the element and establish guilt for the robbery. *Cook* concluded that, under the accusatory pleading test, overt act allegations may be considered with conspiracy allegations when determining whether an offense is a lesser included offense of conspiracy. (*Cook*, at p. 920.) However, an overt act is an element of the crime of conspiracy. (*People v. Russo* (2001) 25 Cal.4th 1124, 1134.) As appellant concedes, a statute of limitations is not an element of forcible rape.

fully asserting something, . . . usually they will minimize to a little bit of touching, a little bit of that. And a lot of times they will . . . put a lot of blame onto the victims for their actions." (*Sic*.)

After the parties at the court's request approached sidebar, the court indicated, inter alia, as follows. The court did not know if the prosecutor had expected Stelter's above testimony, but Stelter was not qualified as an expert to testify that child abusers or sexual abusers minimized matters, her testimony suggested appellant minimized what had happened, and the court would not permit Stelter to offer expert testimony appellant minimized matters. The court assumed appellant had a problem with Stelter's testimony but the court was not going to emphasize it by taking any action unless appellant wanted the court to do so.

Appellant appeared to indicate he did not want the court to take any action. The prosecutor indicated as follows. The prosecutor was "gonna kind of go into these issues" (*sic*) but was not expecting Stelter "to just blur[t] it out." The prosecutor had been planning to ask Stelter how interrogation techniques in these types of cases, as distinct from other types of cases, differed. The prosecutor intended to elicit testimony from Stelter to the effect a detective might suggest to a suspect in a child sex abuse case that the child was attractive and, therefore, the detective understood why the suspect was interested in the child. The prosecutor wanted to elicit such testimony so the jury would understand the suggestion was merely an interrogation tactic and not what the detective really believed. Stelter's testimony on that issue would be relevant to other detectives' actions.

After the sidebar discussion, the prosecutor pursued a different line of questioning. Appellant did not ask the court to strike Stelter's above testimony.

Appellant claims the prosecutor committed misconduct by intentionally eliciting from Stelter inadmissible lay opinion that suspects, like appellant, in child abuse or sexual abuse cases minimized what occurred and tried to shift the blame to the victim. The claim is unavailing. Appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to the prosecutor's question, which would have cured any harm. Appellant waived the issue of whether the prosecutor committed

misconduct. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

Even if appellant did not waive the issue, we note the following. The court did not suggest the prosecutor intentionally elicited inadmissible testimony; in fact, the court indicated it did not know whether the prosecutor expected Stelter's testimony. The prosecutor did not explicitly state she had intended to elicit Stelter's testimony. The prosecutor merely commented she was "gonna kind of go into these issues." (*Sic*.) In fact, the prosecutor indicated the testimony she had planned to elicit from Stelter was to the effect detectives use an interrogation tactic of pretending to understand why a suspect in a child abuse case was sexually interested in the child. Appellant does not suggest such testimony would have been inadmissible. In sum, Stelter's testimony differed from the testimony the prosecutor intended to elicit from Stelter.

The burden is on appellant to demonstrate error; it will not be presumed. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Appellant has failed to demonstrate the prosecutor intentionally elicited from Stelter inadmissible lay opinion that suspects, like appellant, in child abuse or sexual abuse cases minimized what occurred and tried to shift the blame to the victim. The prosecutor's mere eliciting of evidence was not misconduct. (Cf. *People v. Mills* (2010) 48 Cal.4th 158, 199.)

Appellant also claims he was denied effective assistance of counsel by his trial counsel's failure to object to the above alleged prosecutorial misconduct, and failure to object to, or move to strike, Stelter's above testimony. We disagree. The failure to object to evidence is a matter which usually involves tactical decisions on counsel's part and seldom establishes a counsel's incompetence. (*People v. Frierson* (1979) 25 Cal.3d 142, 158.) The record sheds no light on why appellant's trial counsel failed to act in the manner challenged, the record does not reflect said counsel was asked for an explanation and failed to provide one, and we cannot say there simply could have been no satisfactory explanation. For example, trial counsel reasonably might have believed it was common knowledge that police often disbelieved suspects, and that child abuse suspects might minimize what they did and try to blame the victims. Stelter, in her challenged testimony, did not explicitly

refer to appellant; trial counsel reasonably might have chosen for tactical reasons not to draw attention to Stelter's testimony. We reject appellant's ineffective assistance claim. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

3. *The Trial Court Did Not Prejudicially Err by Giving CALCRIM No. 358.*

The trial court gave to the jury without objection CALCRIM No. 358, concerning evidence of a defendant's statements.[6] Appellant claims the instruction was erroneous because its last sentence fails to state it applies only to any inculpatory statements by appellant. We conclude otherwise.

Appellant's oral statements to police were inculpatory to the extent he admitted having sexual relations with S.R., a minor, and exculpatory to the extent he claimed those relations were consensual. Moreover, as our Factual Summary reveals, appellant made inculpatory oral statements to S.R. and L.P. during his commission of the crimes against them. In other words, there was substantial evidence appellant made inculpatory and exculpatory statements.

To the extent the instruction's last sentence told the jury to consider with caution any oral inculpatory statements by appellant, there is no dispute the giving of the instruction was proper. To the extent the instruction's last sentence told the jury to consider with caution any oral exculpatory statements by appellant, generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (Cf. *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156 (*Palmer*).)

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[6] That instruction stated, "You have heard evidence that the defendant made oral statements before the trial. You must decide whether or not the defendant made any such statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements. [¶] *You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.*" (Italics added.)

As mentioned, the given instruction was correct in law to the extent it pertained to any inculpatory statements by appellant and the instruction was responsive to the evidence. To the extent appellant argues the instruction was erroneous because its last sentence failed to state it applied only to inculpatory statements, appellant waived the issue by failing to request appropriate clarifying or amplifying language. (Cf. *Palmer*, *supra*, 133 Cal.App.4th at p. 1156.)

Even if the issue was not waived, the instruction was proper to the extent it pertained to any inculpatory statements by appellant. There was substantial evidence appellant committed the offenses of which he was convicted. The jury reasonably could have viewed as false and self-serving any exculpatory statements by appellant. The defense evidence was appellant was a person of good character and behavior, suggesting he committed no crimes, not that he committed unlawful sexual intercourse with S.R. The jury rejected the defense evidence, and the court did not instruct the jury to view his trial testimony with caution. A jury rejecting defense evidence of appellant's good character and behavior offered to show he committed no crimes was unlikely to accept that evidence to show, as his statements to police suggested, S.R. consented while he was engaged in opprobrious sexual intercourse with her. The trial court did not prejudicially err by giving CALCRIM No. 358. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.